In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1496

ERNESTO SANTO GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that it was reversible error for the trial judge to fail to charge, *sua sponte*, on identification.

1. After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on three counts of knowing and intentional importation and possession of marijuana, and conspiracy to commit those offenses, in violation of 18 U.S.C. 2, and 21 U.S.C. 841(a)(1), 846, 952(a), 960(a)(1) and 963. He was sentenced to five years' imprisonment and a five year special parole term.[1] The court of appeals affirmed (Pet. App.).

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[1]Also convicted with petitioner were Hugo Suarez, Jose Ancisar Pineda-Marin, Erasmus Flecha, and Moises Banguera. Suarez and Pineda-Marin were sentenced to four years' imprisonment and a three year special parole term, Flecha to four years' imprisonment and a two year special parole term, and Banguera, who was convicted on only on count, to two years' imprisonment and a ten year special parole term. This Court denied Suarez's petition for a writ of certiorari, No. 73-6509, on June 17, 1974.

At approximately 11:30 a.m. on March 25, 1973, the *Francisco Miguel*, a freighter of Colombian registry, arrived in New York and tied up at the State Pier, in Brooklyn (Tr. 166).[2] That evening, at approximately 9:00, customs agents, acting under the direction of Special Agent John Greico, placed the vessel under surveillance from eight observation posts surrounding the ship (Tr. 166-169). This surveillance was predicated upon information received from the Galveston, Texas, office of the United States Customs Service to the effect that this vessel was suspected of being used to transport narcotics to this country (Tr. 44, 50).

Agent Greico, who was situated in an office overlooking the stern of the vessel, observed Suarez and Pineda-Marin, both crewmen, in conversation on the deck of the ship between the hours of 10:00 p.m. and midnight (Tr. 172). Special Agent Robert Graham, who joined Greico in the office observation post at about midnight, observed Flecha on the deck (Tr. 304-305). Graham observed Flecha, Pineda-Marin, and Suarez conversing together on at least four occasions between midnight and 1:50 a.m. (Tr. 304-305).[3] On one occasion, all three entered a hatchway at the rear of the ship (Tr. 305). At trial it was brought out that Suarez was the deck watchman on the ship between midnight and 4:00 a.m. (Tr. 396).

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[2]"Tr." designates the transcript of the suppression hearing and the trial, a copy of which is being lodged with the Clerk of this Court.

[3]Flecha and Suarez were also observed conversing on the deck near the gangplank, on the port side of the vessel, by Special Agent Eugene Weinschenk (Tr. 331).

At approximately 1:50 a.m., Agents Graham and Greico observed four men emerge from the rear hatchway of the ship, which Flecha, Pineda-Marin and Suarez had earlier been observed entering. The men dragged four large bales from the hatchway to a point amidship on the starboard side of the vessel, which was the side away from the pier (Tr. 175-176, 306). Agent Graham identified Pineda-Marin and Flecha as two of the four men dragging the bales; Greico identified petitioner, Flecha and Pineda-Marin (Tr. 174-176, 306). Graham and Greico shared a pair of field glasses at this observation post, which was approximately 50 feet from the stern of the ship, and each used the binoculars for his observation (Tr. 173, 306). It had been raining continuously since midnight (Tr. 177).

The area to which the men carried the bales on the starboard side of the ship was not lit, unlike the identical area on the port, or land, side of the vessel, which was illuminated (Tr. 191). At approximately 1:55 a.m., five minutes after petitioner, Flecha, Pineda-Marin and the fourth, unidentified individual had been observed taking the bales onto the deck, Special Agent Henry Maurer, who had been assigned to another observation post situated on a tugboat near the ship (Tr. 350), observed six men enter the pier area through a hole in the fence and hasten to the vicinity of a grain elevator building near the bow of the ship (Tr. 351). After observing this occurrence, Agent Maurer lost sight of these men (Tr. 352).

At approximately 2:00 a.m., Special Agent Eugene Weinschenk, who was at an observation post inside the grain elevator building, near the bow of the ship, observed two men run in a crouched position out onto a pier past the bow of the ship. Once past the bow of the ship,

one of the men grabbed a wire hanging from a piling and slid into the water. The other man, later identified as co-defendant Banguera, remained crouching at the piling (Tr. 327, 328). The man who went into the water swam toward the bow of the ship (Tr. 331).

This information was communicated to Agent Greico via radio, and the decision was made to close in (Tr. 329). Petitioner, Suarez, Pineda-Marin, and Flecha were apprehended aboard the ship. Banguera was arrested on the pier where he had remained crouching against the piling (Tr. 360, 361-364).

Special Agent Victor Cabrera was one of the first agents to board the ship. He and Agent Muniz ran up the gangplank on the port side of the vessel, where they found Suarez and Pineda-Marin (Tr. 361). While Muniz remained with these men, Cabrera ran through a passageway to the starboard side of the ship (Tr. 361). There he spotted two individuals, later identified as petitioner and Flecha, running from the middle of the ship toward the stern. The agent announced his identity and ordered them to stop, but they continued running. Cabrera fell on the wet deck, and his gun went off. At this point petitioner stopped, but Flecha continued running and went down the rear hatchway of the ship. He was apprehended at the entrance to the crew's quarters below deck (Tr. 361-364).

After the five defendants had been rounded up, petitioner was overheard saying to Flecha, in Spanish, "Why so much excitement? If we are caught, we are caught" (Tr. 365-366).

Subsequent to the arrest, four bales covered with oil-soaked burlap were discovered at the place on the ship

where Agents Greico and Graham had earlier seen the four men dragging the bales (Tr. 174). These bales contained a total of 287 pounds of marijuana (Tr. 88, 302).

At trial, Manuel Restrepo, Captain of the *Francisco Miguel,* testified as a government witness. He testified that Pineda-Marin and Suarez were crew members, but petitioner and Flecha were not (Tr. 398).

2. Petitioner contends that in the circumstances of this case the judge should have charged the jury *sua sponte* on the issue of identification.[4] To support his contention, petitioner cites decisions in the District of Columbia, Third, and Fourth Circuits. These cases are inapposite. In *Jones* v. *United States,* 361 F. 2d 537, 542 (C.A.D.C.), where the defendant impeached the credibility of the government's only identification witness, the court of appeals held:

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[4]The trial judge charged the jury as follows (Tr. 589-591):

> The Government must show beyond a reasonable doubt that the conspiracy was knowingly formed and that the defendant wilfully participated in the unlawful crime with the intent to advance or further some object or purpose of the conspiracy. That agreement may be inferred from the circumstances and conduct of the parties, since ordinarily a conspiracy is characterized by secrecy and they do not enter into it openly. Nevertheless, suspicion alone cannot be a substitute for evidence.
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> A difficult part of your job is to evaluate the credibility of the witnesses you heard. You can consider the relationship of the witness to the Government, his bias or his interest in the outcome of the case, his manner while he was testifying, he [sic] candor, his intelligence as you observed it and the extent to which he has been corroborated by other evidence.
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> * * * * *

> When the defendant has placed the prosecutor's identification of him in issue, either by his own direct denial, by the production of alibi witnesses, or by impeachment of opposing witnesses, *and when the defendant asks for a special instruction on the issue of identification,* the district court should frame an instruction adapted to the evidence in the particular case. [Emphasis added.]

The court in *Jones,* however, rejected the defendant's suggestion that even without request such an instruction was automatically required *(id.* at 541) and upheld the defendant's conviction, stating *(id.* at 542) that "there is no claim whatsoever that the complaining witness' identification of the defendant was in any way complicated or discredited by any related experience as the victim of a crime of violence." This observation is equally applicable to Agent Greico's identification of petitioner.[5] Petitioner had ample opportunity to cross-examine Greico as to the basis for his identification, and he at no time requested an identification charge or objected to the judge's charge (Pet. 11).

The Fourth Circuit's approval of the District of Columbia Circuit rule in *United States* v. *Levi,* 405 F. 2d 380, 382-383, and the Third Circuit's consideration of the identification charge in *United States* v. *Barber,* 442 F. 2d 517, 525-526, arose in the context of a request for such an identification instruction by the defendant. This case,

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[5]As described above, petitioner's attempted flight and his statement "If we are caught, we are caught" corroborated, rather than discredited, Greico's identification of him.

therefore, does not create conflict among the circuits. See also *McGee* v. *United States*, 402 F. 2d 434, 436 (C.A. 10), certiorari denied, 394 U.S. 908; *United States* v. *Telfaire*, 469 F. 2d 552, 556-557 (C.A.D.C.); *Gregory* v. *United States*, 369 F. 2d 185, 190-191 (C.A.D.C.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1974.

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